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No. 79-2059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN ELECTRIC POWER COMPANY, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, and INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,
Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA, Municipal Corporations,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	2
II.	SUMMARY OF ARGUMENT	6
III.	ARGUMENT	9
	A. The Court Of Appeals Correctly Held That The Noerr-Pennington Doctrine Does Not Preclude Consideration Of Petitioners' Rate Practices In The Circumstances Of This Case	9
	B. Petitioners' Conduct Is Not Immunized By Exclusive Jurisdiction	13
	C. Petitioners' Anticompetitive Acts And Practices Are Not Sheltered By The "State Action" Exemption	20
	D. The Lower Courts Correctly Recognized A Utility's Obligation To Consider The Anticompetitive Impact Of Its Dual Rate Structure In Determining The Level Of Its Federal Rates	23
	E. The Court Of Appeals Correctly Awarded The Respondent Municipalities Their Litigation Expenses In Resisting Petitioners' Threats To Their Power Supply	27
IV.	CONCLUSION	30

TABLE OF AUTHORITIES

Cases: Page

Adickes v. *Kress & Co.*, 398 U.S. 144 (1970) 28
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 27-29
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 18
California v. *Federal Power Commission*, 369 U.S. 482 (1962) 9, 16
California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 11, 12
California Retail Liquor Dealers Association v. *Midcal Aluminum, Inc.*, 100 S. Ct. 937 (1980) .. 20, 22
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 7, 9, 13, 16
Central Hudson Gas & Electric Corp. v. *Public Service Commission of New York*, 48 U.S.L.W. 4783 (June 20, 1980) 12
City of Lafayette, Louisiana v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 12, 20-21
City of Mishawaka, Indiana v. *American Electric Power Co.*, 465 F. Supp. 1320 (N.D. Ind. 1979) ..*passim*
City of Mishawaka, Indiana v. *American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980) .....*passim*
City of Mishawaka, Indiana v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) .....*passim*
Conway Corp. v. *Federal Power Commission*, 510 F.2d 1264 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976) 25, 26
Dairy Foods, Inc. v. *Dairy Maid Products Cooperative*, 297 F.2d 805 (7th Cir. 1961) 29
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 11, 13
Federal Power Commission v. *Conway*, 426 U.S. 271 (1976) 8, 23, 25-27
Federal Power Commission v. *Hunt*, 376 U.S. 515 (1964) 18
Federal Power Commission v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) 18

TABLE OF AUTHORITIES—Continued

	Page
Friedman v. *Rogers*, 440 U.S. 1 (1979)	12
Gordon v. *New York Stock Exchange*, 422 U.S. 659 (1975)	9, 16
Gulf States Utilities Co. v. *Federal Power Commission*, 411 U.S. 747 (1973)	9, 16
Hampton v. *Hanrahan*, 100 S. Ct. 1987 (1980)	28
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968)	5, 18
Hughes Tool Co. v. *Trans World Airlines*, 409 U.S. 363 (1973)	9
Locklin v. *Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971)	29
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951)	18, 25
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)	28
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973)	9, 16-17
Parker v. *Brown*, 317 U.S. 341 (1943)	20
Roadway Express, Inc. v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980)	28
Sargent-Welch Scientific Co. v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978)	5
Scott v. *Local 377, Intnl. Brotherhood of Teamsters*, 548 F.2d 1244 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977)	28
Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963)	16
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)	22
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965)	11
United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963)	9, 16
United States v. *Radio Corporation of America*, 358 U.S. 334 (1959)	9

TABLE OF AUTHORITIES—Continued

Page

Vaughan v. *Atkinson*, 369 U.S. 527 (1962)
Wilmorite, Inc. v. *Eagen Real Estate, Inc.*, 454 F. Supp. 1124 (N.D.N.Y. 1977), *aff'd on opinion below*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978) 11

Statutes:

Federal Power Act, § 205, 16 U.S.C.A. § 824d (1974 & Supp. 1980) 23-27
Sherman Act, § 2, 15 U.S.C.A. § 2 (1973 & Supp. 1980) 2, 7

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I. STATEMENT OF THE CASE

Petitioners' statement of the case attempts to isolate their rate practices from their other anticompetitve acts and practices that, taken together, were found to constitute violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, by the United States District Court for the Northern District of Indiana, *City of Mishawaka, Indiana* v. *American Electric Power Co.*, 465 F.Supp. 1320 (N.D. Ind. 1979), and by the United States Court of Appeals for the Seventh Circuit, *City of Mishawaka, Indiana* v. *American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980).[1] Petitioners' selective view of the facts has been rejected by the lower courts, however, *City of Mishawaka*, 465 F.Supp., at 66a, 76a; *Mishawaka II*, at 19a-20a, 24a, and offers a distorted perspective of those decisions to this Court.[2] Since an understanding

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[1] Unless otherwise indicated, all references to the court of appeals' decision will be to the second decision of the court of appeals, and that decision will be referred to as *Mishawaka II* when appropriate to make the citation reference clear. References to the first decision of the court of appeals, *City of Mishawaka, Indiana* v. *Indiana & Michigan Electric Power Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), will be identified as *Mishawaka I*, and the district court decision will be referred to as *City of Mishawaka* in cases in which the context does not indicate that the citation refers to that decision. All three decisions will be cited to as set forth in petitioners' appendix and identified by page in that appendix. Citations to the district court's Findings of Fact will be identified as "Finding" and will likewise be cited to the page in petitioners' appendix where that finding appears.

[2] As the court of appeals explained:

> "The utility would have us consider each separate aspect of its conduct separately and in a vacuum. If we did, we might agree with the utility that no one aspect

of the total case is essential to assess the questions presented, respondents set forth their separate statement of what transpired below.

Respondents are ten municipalities that own and operate their own electric utility systems. Each is located within the service area of the petitioner Indiana & Michigan Electric Company ("I&M"), and each purchases its bulk electric power requirements from I&M for its own use and for resale to its customers. The courts below found that, through I&M, the petitioners have a monopoly of the retail sales of electricity within I&M's service area, and that they likewise have a monopoly of the supply of wholesale electric power on which the municipalities depend for their own requirements and for retail sales of electricity to their customers.[3]

As the lower courts found, petitioners have had an active policy of increasing I&M's monopoly in retail sales of electricity by acquiring the facilities of municipally-owned utilities and thereby obtaining the

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standing alone is illegal. It is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor." 24a.

[3] I&M's direct sales to customers within its service area, ("retail rates") are regulated by the Indiana Public Service Commission and the Michigan Public Service Commission, and can only be made pursuant to rates previously approved by them. I&M's sales to the plaintiff municipalities for resale to their customers ("wholesale rates") are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or "Commission"). Those rates are not approved by the Commission prior to going into effect. Rather, they are charged at levels established by I&M's rate filings, subject to refund after the Commission adjudicates the appropriate rate. As the Seventh Circuit noted, no wholesale rate filed by I&M has been approved at the level filed, 16a. That observation remains true today.

right to serve the municipality's customers directly at retail. *City of Mishawaka*, 54a; *Mishawaka II*, 23a. Petitioners' attempt to portray their acquisition policy as a product of the past, Petitioners' Br. at 10, is belied by the record. The district court found that petitioners' acquisition policies, and the anticompetitive practices that propel them, continue. *See* Findings 76-84; 142a-148a. *City of Mishawaka*, 54a.[4] The Seventh Circuit agreed, commenting, "There were also utility attempts to acquire certain municipal systems and also interest expressed by the utility in acquiring others in the relevant service area extending into 1977," 23a; *see also* 20a.

The district court examined the petitioners' rate practices, their repeated discriminatory threats to the municipalities' power supply, and their municipal takeover program, and found each to be an integral part of a pattern of "anticompetitive and exclusionary acts and practices having the purpose and effect of preserving and expanding I&M's existing monopoly in retail sales of electric power." 57a. As the Seventh Circuit summarized, "It was the trial court's view that the utility's use of the diverse rate regulation structure and its other acts contributed to a municipal system's vulnerability to utility takeover," 23a, and it affirmed the district court's finding of liability on the ground that its "assessment of the evidence as a whole" led it to concur that "all the evidence

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[4] As the district court stated:

> "At issue in this case is the manner in which defendants have used the leverage afforded by [I&M's] total monopoly over plaintiffs' power supply to preserve and expand their monopoly of retail sales in I&M's service area. The evidence shows that defendants have engaged in anticompetitive and exclusionary acts and practices having the purpose and effect of preserving and expanding I&M's existing monopoly in retail sales of electric power." 57a.

of the utility's activities [disclosed] a specific utility intent to serve its monopolistic purposes at municipal expense." 21a.

As the Seventh Circuit noted, this case is "complex factually and legally." 8a. Thus, petitioners' attempt to focus on I&M's rate practices to the exclusion of their other anticompetitive acts and practices distorts the basis of the decisions below. The court of appeals also recognized that the evidentiary record below is "voluminous" and that the district court's approach toward that record was obviously influenced by the "serious reservations" it expressed regarding the credibility of highly-placed management officials who attempted to disclaim knowledge of the obvious consequences of their actions. 9a. *See also* Finding 85; 148a. An examination of the decision below shows that the Seventh Circuit was not content merely to accept the trial court's assessment of the facts, and that its affirmance rests on its own detailed and knowledgeable review of the record.

Petitioners' arguments are premised in major part on their assertion that the court of appeals simply followed a "ritual application of antitrust principles" to the instant case. Petitioners' Br. at 12-14. In fact, the contrary is true. For example, although that court earlier had held that specific intent need not always be proved to establish a Sherman Act violation, *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978), it specifically declined to follow that broader rationale here. Instead, the court limited the reach of its affirmance to cases presenting conduct evidencing "specific utility intent to serve its monopolistic purposes at municipal expense," which it found to be established by the evidence as a whole. 21a. Similarly, the court of appeals reversed the district court's damage award, which had been based on *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), finding that doctrine inapplicable to

a regulated utility that might ultimately be required to refund its overcharges in federal rates and prescribing a more limited approach to the damage question to be followed by the district court on remand. 29a-31a. The Seventh Circuit also vacated portions of the lower court's injunctive decree that it found to lack the "flexibility . . . required . . . so as to permit the utility an opportunity to justify some short term variations," 35a-36a, and outlined a number of more limited remedial measures for the district court's consideration, specifically admonishing that court to be "careful not to encroach any further on the rate making process than may be temporarily required by antitrust considerations." 37a. Finally, the court instructed the district court to provide a mechanism to "return rate control to the regulating commissions established respectively by Congress and the state legislatures for that purpose." 36a.

II. SUMMARY OF ARGUMENT

An examination of the opinion sought to be reviewed reveals that the Seventh Circuit's decision does not reflect "an expansive view of the application of antitrust laws to the rates of the regulated electric utility industry", as Petitioners suggest. Petitioners' Br. at 15. The court did not view simple disparities in state and federally-regulated rates as a basis for antitrust liability, and its opinion does not countenance any relief based on so simple a premise. To the contrary, the court of appeals decision represents a careful accommodation of antitrust and regulatory principles. The decision does not foretell the demise of the regulated public utility, as the petitioners might wish this Court to believe, and the unique facts on which it rests will prove difficult to duplicate in the other antitrust cases cited in Petitioners' Brief.

Petitioners' *Noerr-Pennington* argument is based on a selective view of the record which focuses on their rate-

making practices and conveniently ignores the various other anticompetitive acts and practices shown by the evidence, which combined to demonstrate the specific intent to monopolize that established a violation of Section 2 of the Sherman Act. The court of appeals correctly rejected the contention that *Noerr-Pennington* precludes any consideration of petitioners' rate practices along with their other anticompetitive acts and practices. Its decision is supported by this Court's holding in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); by the finding that petitioners abused the administrative process, and by the relationship of petitioners' rate practices with their other illegal acts and the proof of petitioners' intent to expand their monopoly position at the municipalities' expense. The court of appeals' rejection of the *Noerr-Pennington* defense is likewise supported by the absence of circumstances suggesting that the kinds of core First Amendment concerns on which the *Noerr-Pennington* doctrine is based are seriously implicated by the facts of this case.

Similarly, petitioners' assertion that the Federal Energy Regulatory Commission has exclusive jurisdiction to consider petitioners' rate practices is based on the mistaken assertion that the court of appeals' decision creates a conflict between the Federal Power Act and the Sherman Act. The court of appeals decision reflects a careful accommodation of the antitrust laws and the Federal Power Act, however, and it avoids interference with the regulatory functions of the FERC. This Court has repeatedly held that regulated electric utilities are not immunized from antitrust liability, and has previously declined to grant certiorari to review this issue in this very case. The issue is even less certworthy now than it was before.

The lower courts' interpretation of the Federal Power Act is likewise correct. Following this Court's decision in *Federal Power Commission* v. *Conway*, 426 U.S. 271 (1976), the courts below correctly held that petitioners must consider the possible anticompetitive effects of disparities between their wholesale and retail rates before filing their wholesale rates and putting them into effect. Petitioners' attack on this holding rests on a mistaken interpretation of the decisions below and is without merit. Similarly, the court of appeals' award of the respondent municipalities' litigation expenses in resisting petitioners' threats to their power supply correctly applies accepted principles. Petitioners' challenge on this point was not raised below. It is without merit and does not warrant this Court's review.

Petitioners can point to no conflict among the circuits on any of the myriad questions they present for review, and the full contours of this decision remain to be spelled out by the district court under the Seventh Circuit's careful instructions on remand. The decision below is correct and, in any event, does not warrant this Court's review.

III. ARGUMENT

A. The Court Of Appeals Correctly Held That The Noerr-Pennington Doctrine Does Not Preclude Consideration of Petitioners' Rate Practices In The Circumstances Of This Case.

Petitioners' *Noerr* v. *Pennington* theory would cut with a broad swath in the antitrust laws, where "repeal . . . by implication is not favored and not casually to be allowed."[5] *Gordon* v. *New York Stock Exchange*, 422

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[5] The breadth of the antitrust exemption urged by petitioners is at odds with this Court's repeated holdings that public utilities are not exempt from the antitrust laws merely because they are regulated by state or federal agencies, *see, e.g., Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747 (1973); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *California* v. *Federal Power Commission*, 369 U.S. 482 (1962). Petitioners' argument now seeks to erect a separate basis for an implied immunity from the antitrust laws, advancing their tenuous First Amendment interests in an indirect effort to revive arguments for antitrust immunities that have been repeatedly rejected under the Federal Power Act. Acceptance of petitioners' argument also would eradicate a substantial body of antitrust precedents applicable to other regulated entities which generally act on the basis of petitions filed with the respective authorities that regulate important aspects of their conduct. *E.g., United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) (applying the Clayton Act to bank mergers that were subject to federal regulatory approval); *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959) (holding that the exchange of radio stations that had been approved by the Federal Communications Commission was nevertheless subject to attack in an antitrust proceeding); *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1973) (finding antitrust immunity for the activities in question but cautioning that not all activities that were regulated by the CAB would be afforded similar immunities).

U.S. 659, 682 (1975). It is not supported by the decisions of this Court or justified by the facts of the case.

The Seventh Circuit's determination that *Noerr-Pennington* does not preclude an examination of I&M's rate practices in this case is correct. As that court noted, petitioners' rate applications violated Section 205 of the Federal Power Act, 16 U.S.C. § 824d, in that the utility failed to consider the discriminatory effects of its dual rate structure and consider whether they might be avoided. 15a-16a; *see* Part III D, *infra*. Moreover, the court observed that "[t]he utility cannot be heard to say that it does not know that its wholesale rates will have an impact on the municipalities in their retail competition." 16a. The Seventh Circuit endorsed the district court's conclusion that the petitioners patterned I&M's rate filings in a manner that effectively abrogated the protections the respondent municipalities might expect from the FERC, and itself characterized petitioners' practice of filing higher superseding rates before the Commission had adjudicated the former rates as one that created a situation in which "the victim municipalities have been continually living with unregulated wholesale rates." *Id.* As the court of appeals concluded, this "continuing situation appears to us to be an abuse of the administrative process tending to produce, with the other conduct of the utility, an illegal result." *Id.* "The dual regulatory process is being taken undue advantage of by the utility, thwarting the intended balance of federal and state regulation." *Id.*

This conduct, combined with petitioners' unjustified threats to the municipalities' power supply and their demonstrated "appetite for acquiring faltering municipal systems . . . thereby converting municipal retail customers to [their] own," 17a, led the Seventh Circuit to reject petitioners' *Noerr-Pennington* defense. As that court noted, the utility "should not be permitted to "acquire

immunity by seeking refuge under the umbrella of 'political expression,' " 16a, quoting *California Motor Transport Co.* v. *Trucking Unlimited, supra,* 404 U.S. 508, 513 (1972). The court explained:

> "Were we to view it otherwise, the federal and state regulatory processes would provide the utility with a method of effectively advancing its illegal monopolistic purposes while maintaining an outward appearance of total innocence and shielded from the Sherman Act." 15a.

This conclusion is supported by the facts of this case and is entirely consistent with the decisions of this Court.[6] Like the doctrine of exclusive jurisdiction, *Noerr-Pennington* is a doctrine of statutory construction.[7] Since

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[6] Other lower courts have found an exception to the *Noerr-Pennington* doctrine when the conduct of a regulated entity "was part of a larger scheme employing unprotected anticompetitive and monopolistic practices." *Wilmorite, Inc.* v. *Eagen Real Estate, Inc.,* 454 F.Supp. 1124, 1136 (N.D.N.Y. 1977), *aff'd on opinion below,* 578 F.2d 1372 (2d Cir.), *cert. denied,* 439 U.S. 983 (1978).

[7] In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), this Court refused to "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.,* at 137. As the decision made clear, the Court's interpretation of the congressional intent was motivated by its belief that application of the Sherman Act to this conduct would impair the flow of information to the representative branches of government. *Id.* Of "at least equal significance" was the Court's belief that such an interpretation may be at odds with the recognized First Amendment right to petition the government for a redress of grievances. *Id.* at 137-38. *See also, United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972).

its application ultimately turns on a determination of congressional intent, courts applying *Noerr-Pennington* must recognize the strong presumption against implied repeal of the antitrust laws and, accordingly, be careful not to effect wholesale repeals of the Sherman Act. *Cf. City of Lafayette, Louisiana* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398-400 (1978).

Here there is little if any threat to the kinds of First Amendment concerns that underlie the *Noerr-Pennington* doctrine.[8] As the Court stated in *City of Lafayette, supra*, 435 U.S. at 400, *Noerr-Pennington* has not been applied in cases "which, though implicating those fundamental policies, [were] not thought severely to impinge upon them." At issue in this case is the petitioners' dual rate structure, the federal component of which is automatically put into effect by petitioners upon the filing of a new wholesale rate which remains in effect, without regulatory review until the FERC adjudicates its justness and reasonableness. Unlike *Noerr-Pennington* and *California Motor Transport*, this is not a case where the parties have an opportunity to protect their competitive interests in the normal give-and-take that precedes an ultimate decision by a legislator or public official to favor one position at the expense of another. Instead, as the Seventh Circuit found, the conduct in question is essentially unregulated. 16a. And the respondents' complaint is not simply that the utility petitioned for a higher rate, but that the petitioners used

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[8] Assertions of First Amendment protection for commercial speech activities generally do not invoke the same rigorous scrutiny as do constitutional claims related to the kinds of speech that go to the very heart of the First Amendment. See generally, *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 48 U.S.L.W. 4783, 4784 (June 20, 1980); *Friedman* v. *Rogers*, 400 U.S. 1, 10, n.9 (1979).

these unregulated wholesale rates as one of a number of weapons designed to impair the municipalities' competitive position and ultimately to promote their sale. This conduct finds no shelter in the First Amendment, or in statutory interpretations that are motivated by constitutional concerns.

The result advocated by petitioners is precluded by this Court's decision in *Cantor* v. *Detroit Edison Co.*, *supra*, 428 U.S. at 601-602, and is not justified on the facts of this case. As the Court noted in *Cantor*, actions taken by regulated public utilities are "typically . . . a blend of private and public decisionmaking." *Id.*, at 592. The Court refused to afford a *Noerr-Pennington* defense to the electric utility in that case, however, notwithstanding the fact that the practice there at issue had been embodied in a rate filing approved by the State utility commission, stating, "nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff . . . is a sufficient reason for conferring antitrust immunity on the proposed conduct." *Id.*, at 601-602.

B. Petitioners' Conduct Is Not Immunized By Exclusive Jurisdiction.

Both the Department of Justice and the Federal Energy Regulatory Commission previously advised this Court that an implied immunity from the antitrust laws would not be appropriate in this case, *see Indiana & Michigan Electric Co.* v. *City of Mishawaka, Indiana*, No. 77-689 (October Term, 1977), Brief for the United States As Amicus Curiae, at 8-13, and the Court refused to grant certiorari to review this issue. 436 U.S. 922 (1978). A fair assessment of the court of appeals' subsequent decision, and in particular its pronounced solicitude for the FERC's jurisdiction and unique competence, confirms that these earlier judgments were correct.

Petitioners' argument for exclusive jurisdiction rests on a series of false assumptions. First, petitioners contend that the Seventh Circuit created an "overcharge theory" under which proof that the FERC has set a just and reasonable rate below that charged by the utility establishes antitrust liability. Petitioners' Br. at 4, 20. Petitioners then raise the spectre of disruption of all federal regulatory schemes that provide for collection of proposed rates subject to refund, Petitioners' Br. at 21, and intimate that the Seventh Circuit has improperly injected the federal courts into the ratemaking business. Petitioners' Br. at 24-25. Based on this hyperbole, and with only passing analysis of the case law governing the exclusive jurisdiction doctrine, petitioners assert that the "repugnancy between the Federal Power Act and court-ordered ratemaking under the Sherman Act effects an implied repeal of the Sherman Act." Petitioners' Br. at 22.[9]

Petitioners' ultimate argument might be more persuasive if the premises on which it rests were correct. Antitrust liability was not based on the simple fact that the FERC determined that I&M's rates were unjust and unreasonable and ordered refunds, however. To the contrary, the Seventh Circuit specifically restricted antitrust liability to cases where the evidence demonstrates "a specific utility intent to serve its monopolistic purposes

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[9] Petitioners pose the question for review to be as follows:

> "Did not the Court below err in holding that the amount of statutory refund (or the district court's estimate thereof) is a 'monopolistic overcharge' *giving rise to liability under Section 2 of the Sherman Act?*" Petitioners' Br. at 4. (Emphasis added.)

The short answer to that question is that the court did not err in that regard because it did not so hold.

at municipal expense." 21a. Nor does the Seventh Circuit's opinion reflect its acquiescence in "court-ordered ratemaking." Petitioners' Br. at 22. To the contrary, the court of appeals recognized that the FERC has "substantially greater expertise" in ratemaking questions, 27a, and specifically admonished that "[t]he courts should not be in the rate fixing business." 32a. The Seventh Circuit further held that the FERC's determination of the just and reasonable rate was the more accurate measure of any overcharge that petitioners may have imposed, and commented that, in view of the refunds that would be ordered under the Federal Power Act, damages would have to be based on "specific injuries they have suffered as a result of the utility's overcharges and other monopolistic practices." 30a.[10]

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[10] While the Seventh Circuit did suggest that the district court might consider estimating the probable overcharge for periods not yet adjudicated by FERC, it likewise invited the trial court to stay its damage ruling until the FERC has ruled, and it made clear that the Commission's decision is ultimately the determinative standard of overcharge. At the time the Seventh Circuit issued its decision, the FERC had not ruled on petitioners' 1978 wholesale rate. Subsequent to the Seventh Circuit's ruling, however, an Administrative Law Judge of the FERC issued an Initial Decision adjudicating I&M's 1978 wholesale rate and finding that rate to be unjust, unreasonable, and discriminatory. Thus, the prospect of the district court's estimating the extent of overcharge without the benefit of an FERC ruling is illusory. Meanwhile, in the 1976 rate case, the FERC sustained the ALJ's earlier decision that I&M's wholesale rate increase was unjust, unreasonable, and discriminatory. Petitioners' boast that the FERC's decision approved 96% of I&M's rates during the 1976 rate period, Petitioners' Br. at 25, ignores the fact that FERC's decision holds approxi-

Decisions of this Court establish that immunity from the antitrust laws "is not favored" and will only be implied in cases presenting a " 'plain repugnancy between the antitrust and regulatory provisions.' " *Gordon* v. *New York Stock Exchange*, *supra*, 422 U.S. at 682, quoting *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963). "Repeal is to be regarded as implied only if necessary to make the [regulatory system] work, and even then only to the minimum extent necessary." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

This Court has repeatedly held that public utilities are not exempt from the antitrust laws merely because they are regulated by state and federal agencies. *See*, *Cantor* v. *Detroit Edison Co.*, *supra*; *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747 (1973); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *California* v. *Federal Power Commission*, 369 U.S. 482 (1962). "[S]ince our decision in *Otter Tail Power Co.* v. *United States*, *supra*, there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." *Cantor*, *supra*, 428 U.S. at 595, n.35.

Part II of the Federal Power Act, on which petitioners rely, does not expressly exempt electric utilities from the antitrust laws. As this Court observed in *Otter Tail*, "There is nothing in the legislative history [of Part II of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history . . . in-

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mately 89% of I&M's overcharges to the plaintiffs during that period to be unjust, unreasonable, and discriminatory. The municipalities' price squeeze claims in that proceeding remain to be adjudicated and may result in additional rate reductions.

dicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." 410 U.S. at 373-374.[11]

Here, the Seventh Circuit was careful not to create a repugnancy between the antitrust and regulatory regimes, and it approved antitrust liability and remedies only insofar as they complement regulatory remedies. For example, although the FERC does not consider intent to be essential to a determination of a "price squeeze" under the Federal Power Act, *see* 19a, and cases cited therein, the court of appeals required specific intent for an antitrust violation. 21a. The court carefully outlined the possible damages and injunctive relief in a manner that assures that the antitrust remedies supplement those of the FERC. Thus, the court's discussion of damages makes it clear that the trial court can only award damages for specific injuries not remedied by FERC-

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[11] The argument favoring exclusive jurisdiction is weaker here than that held insufficient in *Otter Tail*. There Congress had authorized the Commission to order interconnections and had rejected a provision that would have required a utility to "wheel" energy over its lines, relying instead on voluntary utility action. The dissenters in *Otter Tail* indicated that, but for these congressional decisions, they too would have voted against exclusive agency jurisdiction. 410 U.S. at 390-391, n.7 (Stewart, J., dissenting). Here, there is no such evidence that Congress intended to insulate a utility's structuring of the relationship between its wholesale and retail rates from antitrust scrutiny. Rather, the limitations Congress placed on the Commission's rate setting authority suggest that the Congress intended the antitrust laws to complement the authorities of the FERC and the respective state commissions, and to regulate the conduct that neither the FERC nor the state commissions can regulate effectively.

ordered refunds, 29a-30a,[12] and the possible relief on remand is generally circumscribed to relief that complements the FERC jurisdiction and recognizes its primacy in ratemaking matters. *See* 35a-37a. Finally, the Seventh Circuit regarded its suggested injunctive measures to be only temporary and specifically instructed the district court to return full rate control to the FERC and responsible state agencies once petitioners had dem-

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[12] Petitioners assert that the statutory refund under the Federal Power Act should be "the exclusive remedy for any difference between the rate requested (and collected subject to refund) and the rate ultimately found to be just and reasonable by the Federal Commission." Petitioners' Question 3A, Petitioners' Br. at 3. As the Seventh Circuit stated, however, refunds are "not a complete cure for the illegal activities of the utility." 24a. *See also Mishawaka I*, at 177a-178a. The Commission's authority to adjust wholesale rates in response to its determination of an anticompetitive price squeeze is inadequate to compensate the victims for the antitrust violation. Save for post-suspension refunds of unjustified increases ordered in ongoing proceedings, the FERC is powerless to remedy past unreasonable rates: *i.e.*, it cannot award retroactive reparations. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951). Moreover, once the suspension period has expired, the utility's wholesale customers must pay the filed rate until the Commission finds that rate to be unlawful *Id.* at 251-252. If antitrust remedies were unavailable, wholesale customers would have no remedy for competitive injuries suffered in the interim. Post-suspension refunds, as the Court has observed, are an imperfect compensation for unreasonable rates. *See, e.g., Federal Power Commission* v. *Hunt*, 376 U.S. 515, 524-525 (1964); *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1962). They are even less adequate compensation for the effects of an antitrust violation, for which Congress has authorized treble damages. *See, e.g., Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 488-494 (1968); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946).

onstrated a good faith attempt to comply with their obligations. 36a.

Petitioners' prediction that the decision below will open the federal courts to "a whole new series of elaborate and burdensome problems" and "fresh, unaccustomed and extremely time-consuming burdens," Petitioners' Br. at 25, ignores the value of these decisions in alterting electric utility companies to the risks of monopolistic behavior, and the fact that *Mishawaka II* limits antitrust liability to cases presenting proof of specific intent to monopolize. Few companies have engaged in such a blatant pattern of anticompetitive acts and practices as did the petitioners in this case. Fewer still will be tempted to engage in such illegal conduct in the future. The burdens of compliance with the standards announced in *Mishawaka II* are not onerous and should not be a cause for concern by this Court.

Petitioners' conduct is not immunized by an implied repeal of the Sherman Act. This Court need not grant certiorari to confirm that fact.

C. Petitioners' Anticompetitive Acts And Practices Are Not Sheltered By The "State Action" Exemption.

Petitioners, focusing on their rate practices in isolation from their other anticompetive acts and practices, argue that the Seventh Circuit erred in sustaining "price squeeze liability." Petitioners contend that their ratemaking practices are immune under the "state action" exemption. Petitioners' Br. at 25-28. Petitioners' attempt to immunize their Sherman Act violations with the "state action" exemption is no more persuasive than their argument for exclusive jurisdiction.[13] Certiorari need not be

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[13] The Seventh Circuit rejected petitioner I&M's *Parker* v. *Brown* "state action" position in its first appeal. *See Mishawaka I*, at 166a. I&M chose not to present this question for the Court's consideration in the first petition for certiorari, however, and relied only on its exclusive and primary jurisdiction arguments.

granted to review this question, which was correctly decided below.

As this Court recently summarized in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 100 S.Ct. 937 (1980), two standards must be met to qualify for antitrust immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943):

> "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 100 S.Ct. at 943, quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

Parker v. *Brown* rests on principles of federalism. *Midcal, supra*, 100 S.Ct. at 942; *City of Lafayette, supra*, 435 U.S. at 400. However, as Mr. Justice Brennan noted in *City of Lafayette*, its implied immunity has been "unavailing to prevent antitrust enforcement which, though implicating those fundamental policies, was not thought severely to impinge upon them." *Id.* Thus, persons seeking a "state action" exemption must "demonstrate that there are countervailing policies which are sufficiently weighty to overcome the presumption [that the antitrust laws apply]." *Id.* Moreover, "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *Id.*, at 417.

These principles mandate rejection of petitioners' argument. As the Seventh Circuit recognized, neither Michigan nor Indiana has approved the price squeeze. *Mishawaka I*, 166a. Indeed, the record does not suggest that their regulatory agencies even consider the possible anticompetitive effects of the relationship of wholesale and retail rates, much less adopt policies that reflect a "clearly articulated and affirmatively expressed . . . state policy" on that point that is "actively supervised by the State itself." *Midcal, supra*, 100 U.S. at 943. Indiana and

Michigan appear to have no policy with respect to the price squeeze issue at all, and certainly none that is "sufficiently weighty to overcome the presumption" against implied repeal of the antitrust laws, *City of Lafayette, supra*, 435 U.S. at 400, and to prevent the lower courts' consideration of petitioners' rate practices as an element of their overall anticompetitive strategy.[14]

Petitioners make no argument that the policies of Indiana or Michigan would be impaired in any way by the decision below, and the record is barren of any evidence that would suggest that to be the case. These states simply do not have a policy with respect to the price squeeze here at issue, and it is not a factor in their rate determinations. Thus, an implied repeal based on *Parker* v. *Brown* would be inappropriate to recognize the states' nonexistent regulatory policies and interests when a similar implied repeal is not required to protect FERC regulation, which does address this subject, though partially and ineffectively.

Petitioners' further argument that the price squeeze was forced on them by regulatory agencies' decisions is refuted by the evidence. As the Seventh Circuit observed in *Mishawaka I*,

> "The challenged activity here is a dual rate structure. The state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant. The price squeeze has not been blessed by Indiana or Michigan." 166a.

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[14] The concurring opinions of the Chief Justice and Mr. Justice Marshall likewise support this position. As Mr. Justice Marshall commented, both he and the Chief Justice agreed that "any implied 'state action' exemption from the antitrust laws should be no broader than is necessary to serve the State's legitimate purposes." *City of Lafayette, Louisiana* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 417 (1978) (Marshall, J., concurring).

A "price squeeze" was defined in *Mishawaka II* to be "a situation where a monopolist charges its wholesale customer a wholesale rate high enough to impede that customer's competition with the monopolist in the retail market." 7a, n.4.[15] The decision below is based on a finding of petitioners' specific intent "to serve [their] monopolistic purposes at municipal expense," 21a, and the court of appeals' concurrence with the trial court's determination that "the utility was 'price squeezing' the municipal systems into financial extinction and thereby setting the stage for acquisition of the municipal retail customers as its own." 12a.

The Seventh Circuit's decision is supported by *Cantor*, on which it relied, and by this Court's subsequent decisions in this area. As in *Cantor* and *Midcal*, the states' interest and involvement in the precise conduct in question does not justify an implied repeal of the antitrust laws. This case thus does not present a certworthy issue, particularly in view of this Court's recent full discussion of the *Parker* v. *Brown* principles in *Midcal* and the Seventh Circuit's consistency with them.

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[15] Petitioners suggest that *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), requires that the court of appeals reverse on liability in view of its vacation of the damage award. *Story Parchment* hardly supports that proposition. *Story Parchment* did not discuss the issue of liability to any significant degree, and it recognized the distinction between proof of liability and proof of damages, *see Id.*, at 562, as have other decisions of this Court.

D. The Lower Courts Correctly Recognized A Utility's Obligation To Consider The Anticompetitive Impact Of Its Dual Rate Structure In Determining The Level Of Its Federal Rates.

Petitioners' attack on the lower courts' interpretation of Section 205(b) of the Federal Power Act, 16 U.S.C. § 824d(b), rests on the mistaken claim that the court of appeals construed that provision to obligate "utilities to limit their applications for federal rate increases to the level of rates previously allowed by state agencies." Question B, Petitioners' Br. at 6; *see also* Petitioners Br. at 27-28.

The district court's "limited *Conway* finding" *Misawaka II*, at 14a,[16] is not nearly as rigid as petitioners contend. Fairly read, the obligation found by the lower courts is simply to compare the relationship of their retail rates with the comparable wholesale rates petitioners are considering filing and putting into effect; to consider the possible anticompetitive consequences of any disparities between these wholesale and retail rates; and to avoid such disparities where possible or, at least, to satisfy themselves that such disparities are necessary and can be justified by the factors that go into the petitioners' rate determination in the first instance. This is not an onerous obligation. It allows petitioners to file and put into effect any federal rate they believe is warranted, provided they have satisfied themselves that the resultant rate disparities are necessary and justifiable.

An examination of the opinions below shows that the district court's holding does not require that the utility's federal rates must be "governed" by the state-approved

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[16] Both the district court and the court of appeals referred to the interpretation of Section 205(b) of the Federal Power Act as a "*Conway* obligation", since the interpretation follows from this Court's decision in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976).

rates, and that the court of appeals clearly sanctioned no such result. Although the court of appeals did not discuss the point at length, it is quite clear that it did not understand the trial court to have ruled that Section 205 requires a utility to restrict its federal rates to the level of the state-approved rates. For example, in describing the disrtict court's holding, the Seventh Circuit noted that the Section 205 violation arose from the utility's practice of filing "for the highest rate it thought it could justify *without any regard for the adverse competitive impact the new wholesale rate would have on the utility's wholesale municipal customers in competition with the utility at retail*, 13a (emphasis added), and noted that there is a utility obligation "to avoid *unreasonable* differences in rates between classes of service." 14a (emphasis added). The court subsequently described petitioners' violation to arise from "failing to weigh in advance the discriminatory effects of its differences in wholesale and retail rates," 15a-16a, not simply from creating those disparities.

The Seventh Circuit did not sanction an interpretation of the Federal Power Act that presumes parity between state and federal rates. Indeed, it specifically recognized that different regulatory standards might apply to these rates, 18a, 26a-27a, and vacated the portion of the district court's injunction prohibiting petitioners from charging a wholesale rate higher than the comparable retail unless and until approved by the FERC, concluding that requiring even that temporary parity was impermissible. See 35a-36a.[17]

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[17] That portion of the district court's injunction is set forth in the court of appeals decision, 34a, n.18. Clearly, the district court did not seek to impose the kind of *Conway* obligation that petitioners describe either. Its opinion explained that the injunction was designed to present I&M from putting into effect a wholesale rate higher than the comparable retail rate "unless and until the Federal Energy Regulatory Commis-

The "*Conway* obligation" recognized by the courts below is found on the face of Section 205(b) of the Federal Power Act, 16 U.S.C. § 824d(b), as interpreted by this Court in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976). The Seventh Circuit's ruling is correct, and reflects both the "broadly procompetitive purposes" of Section 205, *Conway Corp.* v. *Federal Power Commission*, 510 F.2d 1264, 1271 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976); *Otter Tail*, *supra*, 410 U.S. at 374, and the Seventh Circuit's recognition that the "antitrust and regulatory regimes accommodate and supplement each other in order to prove full protection from anticompetitive practices." *Mishawaka I*, 173a.[18]

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sion determines that the wholesale rate is just and reasonable," 91a, thus recognizing that a higher wholesale rate might be permitted if properly justified. Similarly, the district court articulated the *Conway* obligation to be only to compare the wholesale and retail rates "and not require any of the plaintiffs to pay more at wholesale that it would pay under I&M's retail rates then in effect *without justifying the higher wholesale rates*," and spoke of "try[ing] to avoid *or, at a minimum, justify* any anticompetitive consequences that the defendants claim cannot be avoided." 58a (emphasis added).

[18] This obligation is important in view of the nature of the federal regulatory process. As petitioners have stated, the statutory reasonableness of their rates is "an abstract quality represented by an area rather than a pinpoint." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, *supra*, 341 U.S. at 251. Thus, in filing a rate increase, petitioners have a range of arguably permissible rates they might file, not a single rate. The FERC process is time-consuming, and the Commission does not determine the justness and reasonableness of petitioners' wholesale rates until a substantial time after they have been filed and put into effect. During this period, petitioners are the sole arbiters of their wholesale rate practices which, as the lower courts recognized, are effectively unregulated. Thus, it is important that petitioners at least consider the possible anticompetitive

Section 205(b) of the Federal Power Act prohibits public utilities from "subject[ing] any person to any undue prejudice or disadvantage" or "maintain[ing] any unreasonable difference in rates," 16 U.S.C. § 824d(b).[19] This Court's decision in *Conway* was based on its determination that the obligation to avoid any "unreasonable difference in rates" encompassed a duty to avoid such discrimination between wholesale and retail rates. *Federal Power Commission* v. *Conway Corp., supra,* 426 U.S. at 277-279; *see also, Conway Corp.* v. *Federal Power Commission, supra,* 510 F.2d at 1270-1272. Thus, the Court ruled that the Commission has jurisdiction to consider the relationship between federally-regulated wholesale rates and state-regulated retail rates when determining the propriety of the former.

The *Conway* Court determined the scope of the Commission's jurisdiction by reference to Section 205(b), a statute that imposes obligations in the first instance on the public utility. The Commission's grant of authority is to enforce "[t]he prohibition against discriminatory or preferential rates or services imposed by § 205(b) . . . ." 426 U.S. at 276, which provides that "[*n*]*o public utility* shall . . . (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or advantage, or (2) maintain any unreasonable difference in rates . . . ." 16 U.S.C. § 824d(b) (emphasis added). Thus, although the pre-

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consequences of their actions, and assure themselves that those consequences are necessary and justifiable before proceeding.

[19] Section 205(b), 16 U.S.C. § 824(b), provides as follows:

> (b) no public utility shall, with respect to any transmission or sale subject to the jurisdiction of the commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any

cise holding in *Conway* relates to the reach of the Commission's jurisdiction, its conclusion that the "undue preference" and "unreasonable difference in rates" provisions of Section 205(b) encompass unreasonable differences between wholesale and retail rates defines the duties and obligations of a public utility subject to Commission jurisdiction. The decision below is thus consistent with this Court's *Conway* decision, and is correct.[20]

E. The Court Of Appeals Correctly Awarded The Respondent Municipalities Their Litigation Expenses In Resisting Petitioners' Threats To Their Power Supply.

Petitioners' last question, Petitioners Br. at 6, was not presented or urged below in opposition to the respondent municipalities' successful cross-appeal in the Seventh Circuit. Indeed, this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), appears in none of petitioners' briefs or arguments in the district court or the court of appeals. As a general rule, this alone requires denial of their attempt

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unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes or service.

[20] This is not "an avulsive change in the law," Petitioners' Br. at 28, n.*. Section 205 of the Power Act was a central part of I&M's obligations for many years prior to the period at issue in this litigation, and the relevant interpretation of that section by the United States Court of Appeals for the District of Columbia Circuit was issued on April 4, 1975, more than a year prior to petitioners' filing of the 1976 wholesale rate. *See* Finding 33, 120a-121a. The evidence clearly indicated that at no point—not even after this Court's subsequent affirmance of the D.C. Circuit's decision—did petitioners ever examine the relationship between I&M's wholesale and retail rates and attempt to avoid or mitigate or justify the anticompetitive consequences resulting from that relationship. 58a. Indeed, they even made no attempt to justify those disparities at trial. *Id.*

to raise the issue for the first time in this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see also NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975) (issue raised in the court of appeals but not discussed in its opinion not considered by this Court.).

In any event *Alyeska* does not discredit the decision below. In *Alyeska*, the Court ruled that the "private attorney general" concept could not be relied on as a basis for awarding attorney's fees to successful litigants against the United States in the absence of statutory authority. The Court recognized a number of situations in which fees are appropriate, however, including cases in which the defendant has acted in bad faith or for oppressive reasons, *see* 421 U.S. at 259, and courts have subsequently recognized that the "American Rule" applied in *Alyeska* does not preclude an award of litigation expenses, including attorney's fees, which are part of the damages resulting from a defendant's wrongful conduct. *Scott* v. *Local 377, Intnl. Brotherhood of Teamsters*, 548 F.2d 1244, 1246 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977); *see also Vaughan* v. *Atkinson*, 369 U.S. 527 (1962).[21]

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[21] The cases cited by petitioners to support their assertion that the Seventh Circuit decision is in derogation of the American Rule are at best inapposite. *Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980), holds that even after *Alyeska* federal courts have the power to include an award of attorney's fees as part of a sanction on a party. *Id.* at 4839-40. To this extent, *Roadway* supports respondents' position. Factually, however, it is far afield, involving federal courts' power to sanction "lawyers who unreasonably extend court proceedings" under 28 U.S.C. §§ 1920, 1927, Federal Rule of Civil Procedure 37, and inherent judicial authority to regulate litigation practices. *Id.*, at 4837. *Hampton* v. *Hanrahan*, 100 S.Ct. 1987 (1980), is wholly inapposite. It held that attorney's fees may not be awarded under the Civil Rights Attorneys Fees Act when the plaintiffs' directed

In this case, petitioners contend that the accepted principle allowing consideration of attorney's fees as an element of damages in antitrust-patent litigation, *see, e.g.*, *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 878 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *Dairy Foods Inc.* v. *Dairy Maid Products Cooperative*, 297 F.2d 805, 808-809 (7th Cir. 1961), should not be applied here because the litigation expenses were "voluntarily incurred." Petitioners' Br. at 30. Once again, however, petitioners' premise is inconsistent with the record below. As the Seventh Circuit noted, "The trial court found that the municipalities *had no choice* but to file an administrative action before the commission to prevent the loss of their wholesale power source and to establish their right to equal treatment with the utility's retail customers whom the utility had indicated would receive preferences." 32a. *See also City of Mishawaka*, at 59a. These threats to the municipalities power supply were found to be part of the petitioners' overall plan of antitrust violations, and both the district court and the court of appeals considered the petitioners' purported excuses for these unjustified threats to be totally fictional. See 16a-17a.

Apart from the mistaken assertion that the litigation expenses were voluntarily incurred, petitioners offer no precedent or reasoned argument for limiting the antitrust patent cases in the manner they urge, and the Seventh Circuit's rejection of their stilted formalism is well reasoned and sound. 31a-32a. The award of the municipalities' cost of administrative litigation costs, including attorneys fees, is not inconsistent with *Alyeska* and indeed

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verdict at trial is reversed and remanded on appeal, and the new proceedings have not yet determined who is the "prevailing party." *Id.*, at 1988. The litigation costs at issue in this case were not awarded respondents as a "prevailing party," and no similar *de novo* proceedings are pending in this case.

falls within the established exception to the "American Rule" noted above.

IV. CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

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